SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 320.

PROCK STONE, Petitioner,

vs.

NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

STATEMENT.

Petitioner's statement is inaccurate in respect to the evidence concerning defendant's beforehand knowledge of the supposed danger. As this may be the crux of the case, we consider it necessary to point out the errors.

We adopt Petitioner's statement with the following corrections:

1. Pp. 2 and 3—The statement implies that it was known that a spike was driven through the tie into the ground

before the accident. The evidence is that this was discovered after the tie was extracted and rolled over (R. 61, 106). See Stone's own admitted statement (R. 35).

2. P. 2—"Dick Stoughton testified that in order to pull out a tie with a spike through it, it would require the efforts of four men (R. 97)." This is incorrect. The testimony was "three or four" men (R. 96). Three were actually used (R. 12). The R. 97 reference is to an alleged impeaching statement.

3. P. 3—"Despite the fact that defendant's straw boss knew it was awful hard, and two men could not pull it, and it required four men, he ordered plaintiff to pull harder (R. 12, 51, 52, 61)." This is a concoction incorrect in detail and result. We are sure petitioner's honorable lawyers will wish to correct it.

a. The "awful hard" ingredient comes from R. 97. It refers to such times in general, not the one involved in the accident.

b. The "it required four men" ingredient is a reference to an impeaching statement as to how many men were "*finally*" required to draw the stubborn tie (R. 97).

c. "Two men could not pull it." This implies two men only were employed at the time. This is false (R. 12).

d. The "Despite the fact that" form of the sentence implies the imputed knowledge *prior* to the order. Such knowledge came to him *after* the order. See a. and b. above.

4. P. 3—"There was sufficient evidence . . . that only two men were actually working at extricating the tie." Petitioner himself testified directly contrariwise on direct examination (R. 12):

Q. Then what did you do? A. Well, we both get back down and give a hard pull with him [Stoughton] a prying and I hurt my back.

5. P. 4—"The testimony also showed that the straw boss had encountered several ties with spikes in them . . ."

a. "Several" is two or three *including* the one in question (R. 94-96).

b. "Had encountered." The use of the pluperfect tense implies that these encounters *preceded* the accident. There is no such evidence, as Stoughton testified he didn't know on which occasion Stone was hurt (R. 98).

6. P. 4—"The boss, Eugene Slagle, said they knew something was holding the tie because it pulled so hard . . ." This is in answer to a hypothetical line of questioning (R. 106). *Slagle wasn't even in the vicinity at the time* (R. 105).

SUMMARY OF ARGUMENT.

I.

Jurisdiction.

1. This court has no constitutional power to impose upon State judicial systems the requirement that disputed fact issues under F. E. L. A. be submitted to a jury. Seventh Amendment is inapplicable.

Illustrations:

a. A twelve-man verdict (required by Seventh Amendment) is not required in the State courts.

b. Louisiana provides a frankly advisory jury trial and frank appellate review of disputed fact issues. This is in direct contravention of the requirements of the Seventh Amendment, yet has never been regarded as unconstitutional.

c. Neither this court, nor any other, challenges the constitutionality of State appellate court's review of one purely factual issue, viz., the amount of damages, although this is prohibited to Federal appellate courts by the Seventh Amendment.

d. State appellate courts have power to reverse a jury verdict outright, whereas Federal appellate courts must remand for a new trial, where a fiction is not observed, because of the Seventh Amendment.

2. Upon review of a State court's decision of a federal question, absent any issue of due process or equal protection, the Supreme Court is bound by the findings of fact ultimately made by the state's judicial system; and if in that system the jury's findings are subordinate to those of the court of last resort, the binding effect of the ultimate findings is none the less.

II.

Merits.

Petitioner is not entitled to relief here, because the facts requisite to liability under any theory he submitted were neither proved nor found by the jury.

State courts have the right to reverse outright because of the failure of a plaintiff's submitted theory of liability, whereas Federal courts must remand if the evidence supports any theory of liability because of the Seventh Amendment.

ARGUMENT.

I.

Jurisdiction.

Jurisdiction of this Court to afford the relief sought by the petitioner is expressly challenged on constitutional grounds.

The kernel of the petitioner's complaint is expressed in his eighth specification of error, as follows:

> "The Supreme Court of Missouri in its opinion erred (8) in substituting its findings of fact for those of the jury in conflict with other applicable decisions of this Court" (Brief, p. 26).

He supports this specification by a quotation from *Bailey v. Central Vermont Railway,* 319 U. S. 350, l. c. 354 (Brief, p. 31) [quoted later in Blair v. B. & O., 323 U. S. 600, 602], as follows:

> "The right to trial by jury is a 'basic and fundamental feature of our system of Federal jurisprudence.' *Jacob v. New York City,* 315 U. S. 752. It is part and parcel of the remedy afforded railroad workers under Federal Employers' Liability Act . . . To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

Other authorities in the United States Supreme Court to this effect are cited (Brief, pp. 31-32). Respondent earnestly requests the Court to review the validity of the foregoing quotation from the *Bailey* case *as applied to state court trials,* and to reconsider the action taken in certain others, in the light of the following suggestion:

The right to trial by jury is part and parcel of the remedy afforded by F. E. L. A. only if the plaintiff exercises his option to bring his suit in the federal court.

F. E. L. A. by its terms does not require a jury trial. It says nothing about a jury, except in Section 3 (U. S. C. A. 53), where the word is obviously used in the sense of "trier of the facts." The origin of the unqualified statement in the *Bailey* opinion quoted above must lie in the United States Constitution, Amendment VII, which provides:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no facts tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

This amendment, however, applies only to trials in the United States courts. It does not apply to trial of any nature in the courts of the various states. Indeed, it would seem that the Court had overlooked the word *Federal* in the quotation from the Jacob case, upon which the *Bailey* decision was based. The complete initial sentence of the *Jacob* case, quoted only in part in *Bailey*, is:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence, which is protected by the Seventh Amendment."

The questions we raise are:

1. **Are the Missouri courts part of "our system of federal jurisprudence"? and**

2. **Are jury trials in such courts "protected by the Seventh Amendment"?**

Four illustrations will show these questions must be answered "no", and that the contrary effect of the holdings in *Bailey*, *Blair* and other cases is an inadvertence.

It has been argued that the Seventh Amendment does apply to state court procedure, and this argument arose under F. E. L. A. It had previously been held by this Court and by inferior courts that the jury trial referred to in the Seventh Amendment means a trial before twelve jurors who must render a unanimous verdict and that the Fourteenth Amendment did not extend the requirements of the Seventh Amendment to state trials of state issues. *Maxwell v. Dow*, 176 U. S. 581, 586.

When F. E. L. A. was enacted and when plaintiffs sought the enforcement of rights arising under the act in the state courts, the railroads raised the question of whether, the right being a federal right, the parties were entitled to a Seventh Amendment jury trial. In a number of cases cited in 1915, this Court ruled that the Seventh Amendment does not apply to actions in the state court, and that a state may legally provide a jury trial with a less-than-unanimous verdict to try cases arising under F. E. L. A. The first of these cases is *Minneapolis & St. Louis R. Co. v. Bombolis, Administrator*, 241 U. S. 211. This opinion and those that followed it show the impatience of the Court with the suggestion that the requirement of a jury trial imposed by the Seventh Amendment applies to state courts, and the effect of these holdings is that any state may set up its own judicial system according to its own notions, in which to enforce any legal right, whether granted by the state or the federal government. So long as the state's judicial system complies with due process and equal protection, the entire effect upon it of the United States Constitution is satisfied.

That this is an accurate constitutional concept is evident from the second clause of the Seventh Amendment,

which prohibits federal courts from re-examining facts tried by a jury. In the absence of this amendment there is no constitutional reason why these facts might not be again reviewed on appeal. Since this amendment has no force to control state court procedure, it follows that factual review by state appellate courts is not prohibited by the Federal Constitution.

Whether state constitutions and statutes prohibit such review, and to what extent, are for the determination of the state involved, through its judiciary, and presents no federal question.

"The highest court of the State is the final judge of the powers conferred by the state laws . . . ," Holmes, J., in King v. West Virginia, 216 U. S., l. c. 101.

It happens that there is a state which expressly affords only an *advisory* jury trial in law cases, as in the former practice we have done everywhere in equity cases. *Delgarn v. New Orleans Land Company,* 161 La. 653, 109 So. 345. That state also permits review of factual findings on appeal in law cases (again cf. equity practice), under its constitutional provisions. Constitution, Louisiana, Art. 7, Sec. 10:29; *Brown v. Louisiana Ry. & Nav. Co.,* 147 La. 829, 86 So. 281, 282; Harvard Law School Bul., Dec., 1952, vol. 3, no. 5.

This is not in the teeth of the Seventh Amendment because the Seventh Amendment does not apply to state procedure. This is a second illustration that F. E. L. A. does not and cannot require a Seventh Amendment jury trial within a state court.

Congress could no more oblige Louisiana to provide a non-reviewable jury trial for F. E. L. A. cases than it could have forced Minnesota to provide a twelve-juror verdict for them. The litigant takes the state judicial

system as he finds it, and if he likes it not, as a plaintiff he has the option of filing his lawsuit in the federal court. Frankfurter, J., dissenting in *Brown v. Western R. of Ala.*, 338 U. S. 294, 300.

If, as petitioner charges, the State of Missouri, through its judiciary, has "arrogated to itself the function of the jury" (Brief, p. 36), we say that it has the constitutional right to do so, just the same as Louisiana! Const. U. S. Amdt. 10, a song whose words we remembered, but whose tune we sometimes forgot.

No charge was made below, nor is it made here, that this alleged conduct has deprived petitioner of equal protection of the laws or of due process; so the question of whether in this case the Missouri procedure was unequally applied is not before this court. "We do not discuss petitioner's contentions which he failed to assign as error below." Slozinsky v. U. S., 300 U. S. 506, 514. In other respects Missouri's civil procedure is her own concern and none of the United States'.

Let us take a third example. It is hard to conceive of an issue more typically factual (as opposed to legal) than the determination of the amount of damages to which an injured plaintiff is entitled. As this is a question of fact, it cannot be reviewed by federal appellate courts for force of the Seventh Amendment. *Smythe Sales Co. v. Petroleum H. & P. Co.*, 141 F. 2d 41. *Lincoln v. Power*, 151 U. S. 436.

It is a commonplace, however, that the state courts have and regularly exercise the right to superintend the amounts of verdicts on appeal, even when the action is based on F. E. L. A.

In *Union Pacific R. Co. v. Hadley*, 246 U. S. 330, the jury returned a verdict under F. E. L. A. for $25,000, which was cut to $15,000 by the trial court and to $13,500 by the

Nebraska Supreme Court. This Court, through Mr. Justice Holmes, affirmed the judgment for $13,500, saying (l. c. 334):

> "The court had the right to require a remittitur if it thought, as naturally it did, that the verdict was too high."

If state appellate courts have power to review this finding of fact, why, constitutionally speaking, have they not the power to review any finding of fact?

There is at least one other—fourth—illustration that a constitutional federal court jury trial differs from an equally constitutional state court jury trial of an F. E. L. A. case. Under the Seventh Amendment a Federal appellate court has no constitutional power to reverse outright a verdict for the plaintiff. The cause must be remanded for a new trial no matter how clear the case may be for the defendant. *Slocum v. New York Life*, 228 U. S. 364. It is true that by the fiction of reserving the ruling on the motion for directed verdict (Baltimore and Carolina v. Redman, 295 U. S. 654) and of *deeming* the reservation to have occurred whether it did or not (Rule 50b), the Court has managed to get around the effect of *Slocum*, notwithstanding the "impassable barrier" warning of Mr. Justice Holmes' dissent, l. c. 400. [The propriety of this fiction we leave to readers of Mr. Justice Black's dissent in Galloway v. U. S., 319 U. S. 372, 396.] The point is that such a fiction is unnecessary in state courts because the Seventh Amendment does not apply to them. *Stoll v. First Nat'l. Bank*, infra.

The right to a jury trial of a Federal question in the state court is not the right to a Seventh Amendment jury trial at all. It is only the right to such a jury trial, if any, as the state affords other litigants.

In *Brady v. Southern Railway Co.*, 320 U. S. 476, the Court held (l. c. 479):

> "There is thus presented the problem of whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury. In Employers' Liability cases, this question must be determined by this Court finally. Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring the act's authority in state courts. Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states (Citing cases). It is true that this Court has held that a state need not provide in F. E. L. A. cases any trial by jury according to the requirements of the Seventh Amendment. *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U. S. 211. But when a state's jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question."

This summary treatment of the constitutional point does not sufficiently define the scope of the Supreme Court's function. Obviously the Supreme Court could not determine the "amount of evidence" necessary to establish the federal right in every case since the amount of evidence which will convince one jury may not be a sufficient amount to convince another jury. Essentially the function of the Supreme Court in these cases is to determine the meaning of the federal statute. Since the statute uses the word "negligence," it is no doubt constitutional for the Supreme Court to define with particularity what the word "negligence" in the statute means under certain facts. The determination of whether these facts exist or not, however, must be a function of the state whose judiciary

is invoked by the plaintiff, through its own procedure, untrammeled by federal interference. Some of the prior opinions, and certainly the petitioner in this case, have lost sight of this fundamental proposition.

We do not contend, if a finding is unsupportable by credible evidence in the record, that the Supreme Court is then bound to accept it; for such a finding would be without due process of law. In this case, however, even the petitioner concedes what respondent does not: that on the evidence the findings could logically go either way (Petition and Brief, pp. 8, 9, 30, 46, etc.). The issue we make is simply whether the United States Constitution permits the Congress (or, really, this Court, since Congress said nothing about it) to designate this or that part of a state's judicial system as the part which must make the findings of fact on a federal question.

A more precise statement of the function of this Court in such instances than in the *Brady* case is the following from *Miedreich v. Lauenstein*, 232 U. S. 236 (l. c. 243):

> "This court has repeatedly held that in cases coming to it from the Supreme Court of a State it accepts as binding the findings upon issues of fact duly made in that court (citing authorities). That principle is applicable here. The case does not come within the exceptional class of cases where what purports to be a finding of fact is not strictly such but is so involved with and dependent upon questions of law bearing upon the alleged Federal right as to be a decision of those questions rather than of a pure question of fact, or where there is that entire lack of evidence to support the conclusion upon the Federal question that gives this court the right of review."

One of the facts upon which the Supreme Court of Missouri decided this case is that the plaintiff did not, at the

time of his injury, exert more force than was ordinarily necessary to draw a tie without a spike in it (R. 133-137). This particular finding is challenged by petitioner (Brief, pp. 44, 45, 46). Petitioner says:

> "This is an unwarranted conclusion of the court based upon an extremely narrow and erroneous construction of evidence and a construction most detrimental to the plaintiff."
>
> "It is for the jury, not the court, to draw all reasonable deductions and inferences from the evidence, whether the evidence be direct or circumstantial.
>
> "Since the jury is the one to resolve conflicts and since there is a conflict in the evidence, an appellate court has no right to substitute its findings for those of the constitutional tribunals appointed by Congress to decide these factual issues."

Such arguments as these, when made in this Court, demonstrate petitioner's failure to understand that the courts of Missouri, which he chose to invoke, were not a "constitutional tribunal appointed by Congress." They are a tribunal set up by the people of Missouri. Whether under the Missouri system of jurisprudence appellate courts do in a given instance usurp the function of a jury in determining factual issues is a question of local procedure to be decided by the state judiciary. In other words, the people of Missouri, like the people of Louisiana, may permit appellate review of facts if they choose to do so. When this Court takes jurisdiction to review the decision of the Missouri Supreme Court it must do so on the facts duly found by the Missouri judicial system, which means, in the last analysis, the Missouri Supreme Court.

In *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, the Court held (l. c. 97):

"The jurisdiction of this court to review the proceedings of the state court, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities and privileges of Federal origin, specifically set up in the state court and denied by the rulings and judgment of that court. Section 709, Rev. Stat. U. S. **Nor does this court sit to review the findings of facts made in the state court, but accepts findings of the court of the state upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court.**" (Citing authorities.)

We feel that the findings of fact of the Missouri court upon which the opinion turns are the only findings of fact which a reasonable man could arrive at in view of the record. But whether this is so or whether the Missouri Supreme Court has only given "lip service" to these principles of law (Brief, p. 32), or whether or not the Missouri Supreme Court has arrogated to itself the function of a jury (Brief, p. 36), or whether or not it has made "a substitution of its findings for those of the jury," we contend that under the Constitution of the United States this Court must take the facts found by the highest judicial court of Missouri (conformably to due process and equal protection) as the basis of its determination of whether a federal right has been denied.

If this be the true jurisdiction of the Supreme Court of the United States, then an examination of the petitioner's petition and brief will disclose that no argument for reversal of the cause has been made. On the facts found by the Missouri Supreme Court, doubtless even the petitioner

will concede that he has no right to recover; for he states the principal question for decision by this Court as follows (Petition, p. 8):

> "Can a State Court of last resort, under the applicable decisions of this Court, in reviewing the evidence submitted to and passed on by a jury, in an action brought under the Federal Employers' Liability Act, substitute its findings, deductions and conclusions from the evidence for that reached by a jury in its verdict **when the evidence justified a verdict either way on the issues?**"

Answer, echo! "Loooo—iiii—sii—anaaaa!"
Echo answers: "Re—ee—ee—mi—ii—ti—tu—ur!"

II.

Merits.

We say, if the inferences (i. e., findings) can be drawn either way on the evidence in the record, that those drawn by the Missouri Supreme Court prevail, under the Missouri system as applied, and therefore under the Federal Constitution, over those drawn by the jury.

However this proposition may fare in this court, we also contend that the judgment of the Supreme Court should be affirmed because conceding to Petitioner all of the reasonable inferences that could be garnered from the evidence, Petitioner did not make out a claim for relief under the act and applicable decisions.

Petitioner's theory of liability in the trial court, in the Missouri Supreme Court, and here, is expressed in his instruction number 1, set out at pages 110 and following of the Transcript.

A number of errors in the manner of submission of the case, including the wording of this instruction, were raised

by the Respondent in the Missouri Courts (T. 119, 120). Because the Missouri Supreme Court held that plaintiff did not make a submissible case under the Act, it did not pass upon the procedural errors raised (Opinion, T. 125), and in case Petitioner prevails here, the cause will be remanded to the Missouri Supreme Court to pass upon these allegations. *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110, 126. For this reason, the errors in the instruction will not be discussed *qua* errors; yet in order to test the sufficiency of Petitioner's facts, it is necessary to place them beside his theory of liability, and to find his theory of liability we must turn to the instruction he offered. Under the Missouri appellate procedure, if plaintiff did not make out a case on the theory submitted in his instructions, the cause may be reversed and not remanded for trial on some other theory. *Stoll v. First National Bank*, 345 Mo. 582, 134 S. W. 2d 97.

Three hypotheses of liability are set out in the instruction and the evidence fails to establish liability under any of them.

Somewhat confusingly, the three theories were combined in a single long instruction (T. 110 et seq.), but each theory was separately and disjunctively stated, and recovery was authorized under any one (T. 113, top).

The More Than Ordinary Strength Theory.

The first theory submitted is that defendant negligently directed plaintiff "to use more strength than was ordinarily necessary and customary" (T. 111).

Petitioner argues this theory from pages 33 to 42 of his brief, and speaks of the findings of the jury. He never once refers to the only source of those findings—the instruction he submitted. He speaks (Brief, 40) as if the jury's finding was that defendant's order required Stone's

"overtaxing his physical condition and ability." This might have been a valid theory had the facts justified such a finding, but there is no use arguing a moot case. The jury did not make such a finding, and was not asked to so find. The most it could be said to have found was that Petitioner was directed "to use more strength than was ordinarily necessary and customary" (T. 111, fol. 281).

We concede that from the evidence it could reasonably be inferred that Stoughton's order required Stone to use more strength than was ordinarily necessary and customary. We deny that such a finding constitutes negligence under F. E. L. A. We do not concede, and for the reasons well expressed in the opinion, that there could be a reasonable inference from the evidence that he was negligently required to overtax his physical condition. However, that question is moot. It does not present in this court a justiciable controversy. Such a finding was not asked, and it was not made. We are here to discuss the record in this case.

We know of no case—none has been cited in any of the three courts—in which liability was affixed for requiring more strength than was ordinarily customary.

Petitioner cites *Waterhouse* (Br. 36). But the Waterhouse jury found, 223 S. W. 2d l. c. 655:

> "The duties assigned Plaintiff by his foreman during the afternoon of August 13, 1947, subjected Plaintiff to a hazard from heat which was greater than ordinary."

Where is the analogous finding of *hazard* in the Stone case?

Further, could any reasonable person find, in the absence of proof of some previously existing disability, that the exertion of more strength than ordinarily required

would create an unusual hazard? In the Waterhouse case there was direct proof of such a disability: "I told him I was getting crazy about the head, and hot; and something was wrong." L. c. 658. Where is the analogous evidence in the Stone case? And the Waterhouse case found on this evidence: "In directing Plaintiff to continue working after being informed by Plaintiff that he was getting too hot, the foreman was guilty of negligence" (l. c. 656). Where is the analogous finding of knowledge of disability in the Stone case?

Petitioner cites the *Blair* case. This is not an overstrain case. It is a negligent method of work case. We do not know, from the opinion, what the findings of the jury were in the *Blair* case. We do know there was evidence that defendant was warned that the method required was dangerous. "Petitioner's insistence that the three could not unload the heavy pipes was overridden." 323 U. S., l. c. 603. There is no analogous testimony in the Stone case. There is certainly no analogous finding. Note that the requirement in the Blair opinion is that there be "reasonable" safety in the manner of work. The vital word "reasonably" is stated, iterated and reiterated in the same sentence (*Blair*, l. c. 601). No such criterion was included in the jury findings in the Stone case, nor could it have been, under the evidence.

The arguments of the Stone opinion on the submissibility of this issue are conclusive. Any fair definition of negligence arising out of an alleged order to overexert should at least include (1) that the amount of exertion required was more than an ordinary laborer could stand, or more than the particular employee, because of some known disability, could stand, and (2) that the employer should reasonably have known of that danger. *Haviland v. Kansas City P. & G. R. Co.*, 172 Mo. 106, 72 S. W. 515. Petitioner has never claimed that he was under any known disability,

nor is there any evidence or finding to that effect (as there was in Waterhouse); yet neither does he claim that the effort required of him was more than an ordinary laborer could stand. There is no evidence or finding to that effect either.

The Petitioner failed to prove facts authorizing submission of a theory of a negligent order to overstrain, and the jury did not find such facts to have occurred. What they did find does not constitute negligence.

The Insufficient Help Theory.

As in the case of the negligent order theory, Petitioner manages to discuss this question without touching the actual jury findings. If the jury found for Petitioner on this theory, it must be said to have done so under the instruction. The instruction predicated a finding of failure to supply more than two men (T. 112, top). Petitioner's own evidence and theory of the case was that when two men proved insufficient, a third, Stoughton, added his strength, with his "prizen hold" (T. 12). Petitioner now for the first time says there is a conflict in the evidence as to whether this was so at the time of Stone's strain, but cites no portion of the record to the contrary. We have read the record references at page 3 of his statement, but find no support in them even for his own conclusion, "apparently." However, in Missouri (and we think under any other civilized procedure) a plaintiff will not be allowed to recover on a theory at odds with his own sworn testimony. *Berry v. K. C. P. S. Co.*, 343 Mo. 474, 484, 121 S. W. 2d 825, 830.

Petitioner testified (T. 12):

"Q. Then what did you do?

"A. Well, we both get back down and give a hard pull with him a prying and I hurt my back."

There were **three men**. The "strongest evidence," in the record, according to Petitioner himself (Br. 42) is that it would be awful hard for **TWO men** to pull such a tie. Even under Petitioner's own theory, the findings and the evidence were insufficient.

But even had there been evidence and a finding there was need for more than three men, which there was not, could we suppose that Stone would have then pulled less hard than he did? This is not a case where the whole weight of an object was thrown upon plaintiff. He could pull as hard as he thought he should. You can lead a horse to water but you can't make him drink. Is it the law that a foreman cannot try to do the work with three, before he brings in a fourth laborer? And who is to say that four will be enough, without trying? Maybe he should use five or six, or seven. Obviously he may try to do the work with any number he chooses, *so long as it appears reasonably safe to do so.* Stone knew far more about the strength he could safely exert than Stoughton, yet he made no suggestion prior to the accident that more were needed, as in the Blair case. Again, the argument of the opinion on this theory is unimpeachable.

Further, the submission, and therefore the finding, was that using two men was not *safe*. This means absolutely safe, not reasonably safe. This has never before been deemed a criterion of liability. The true criterion should be that use of three men was not reasonably safe, and that this was or should have been apparent to defendant. These facts were neither proved, submitted nor found. Petitioner failed on this theory, also.

The Safest Method Theory.

Petitioner in discussing this theory again makes no reference to his submission, but he makes it easier for us in this instance by frankly arguing here that the point in-

volved in this part of the case is that a Federal employer is obliged by the F. E. L. A. expression "negligence" to utilize the *safest* method possible (Br. 50).

He abandons altogether the "reasonably safe" rule, as he must; for his submission and the finding under it is that if there was a *safer* method, defendant must employ it (T. 112).

Obviously, if defendant must employ any safer method, he must employ the safest. Nothing is said about reasonableness. Therefore a reductio ad absurdum is a fair method of argument. The safest method to avoid running a train over a defective tie is to abandon the railroad altogether. The proposition is absurd.

The findings of the jury do not appear in the Meech opinion, which is the only authority Petitioner cites to support this heady proposition. However, a summary of the petition appears at 156 F. 2d 110. The argument quoted at Br. 50 was made in discussing evidence concerning the second count of the petition, which, the court says, was based upon "the defendant's failure to provide him with *a reasonably safe place* to work."

Evidence of a safer method is admissible, to be sure, to support a finding that some other method is not reasonably safe, but there is *no* authority, we are confident, which would dispense with the finding that the method used was not reasonably safe. There was no such finding; and had there been, there was no evidence to support such a finding.

SUMMARY.

Examining the three theories seriatim, we see that the necessary findings are not supported by the evidence, and were not made by the jury. The Missouri Supreme Court properly reversed the trial court judgment outright. In

this connection it will be well to recall that under the Seventh Amendment, Federal courts must judge the sufficiency of the evidence against any theory available under the pleadings, as the motion for directed verdict must be ruled as of the time the ruling is reserved. *Slocum v. N. Y. Life*, supra, et cet. Under Missouri practice, the sufficiency may—and constitutionally—be finally judged on appeal anew against the theory presented by the plaintiff below in his offered instructions. *Stoll v. First National Bank*, supra. This is a condition which Petitioner accepted when he invoked Missouri jurisdiction. This court cannot constitutionally force Missouri to amend its appellate practice to give Petitioner another bite at the apple. He has had his day in court and, hence, due process of law. The writ should be dismissed.

Respectfully submitted,

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